



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA**

**ELC CASE NO. 299 OF 2014**

**MARISELA KHATABIBI KWEYU.....PLAINTIFF**

**VERSUS**

**FRANCIS JUMA WANYAMA**

**HENRY OMUKAMANI WANYUNDI.....DEFENDANTS**

**JUDGEMENT**

This case is that, at all material times to this suit the deceased Desteryo Kweyu Nyapore who died intestate on 23/3/2003 was and still is supposed to be the registered owner of land parcel No. S. Wanga/Lureko/1403. The plaintiff avers that vide an order given by this honourable court on 5<sup>th</sup> March, 2012 in Kakamega HCCC No. 171 of 2010 land parcel No. S. Wanga/Lureko/1403 was to revert in the name of the deceased Desteryo Kweyu Nyapore and remain so registered but on or about the 30<sup>th</sup> day of August, 2013 the defendant who is a stranger to the said deceased fraudulently, illegally, unprocedurally, unlawfully and irregularly had the said title No. S. Wanga/Lureko/1403 transferred to him and thereafter to the 2<sup>nd</sup> defendant thereby disinheriting the deceased's lawful heirs and occasioning the said heirs and the deceased's estate great loss and damage. The plaintiff's claim against the defendants is for a declaration and or order that the purported transfer and or registration of title No. S. Wanga/Lureko/1403 from the deceased Desteryo Kweyu Nyapore into the name of the defendant was fraudulent, irregular, illegal and unlawful and the same be cancelled and or revoked forthwith and it be ordered that the said title reverts to the name of the deceased Desteryo Kweyu Nyapore. The plaintiff prays for judgment against the defendant for:-

(a) A declaration and or order that the purported transfer and or registration of title No. S. Wanga/Lureko/1403 from the deceased Desteryo Kweyu Nyapore into the name of the defendant was fraudulent, irregular, illegal and unlawful and the same be cancelled and or revoked forthwith and it be ordered that the said title reverts to the name of the deceased Desteryo Kweyu Nyapore.

(b) Costs of this suit and interest.

(c) Any other order or relief deemed fit to grant.

The 1<sup>st</sup> defendant in his statement of defence while admitting that land parcel registration number South Wanga/Lureko/1403 belonged to Desterio Kweyu Nyapore, he denies that the plaintiff is the legal administrator of the estate of the deceased. The 1<sup>st</sup> defendant further, admits that the title to land parcel registration number South Wanga/Lureko/1403 was cancelled by the order of Kakamega HCC No. 171 of 2010. The 1<sup>st</sup> defendant avers that he is a son to the deceased one Desterio Kweyu Nyapore and the heir of the estate of the deceased, having successfully acquired letters of administration intestate vide Kakamega HCC Succession No. 461 of 2010. The 1<sup>st</sup> defendant further denies having fraudulently, illegally, unprocedurally, unlawfully and irregularly acquired title to land parcel registration number South Wanga/Lureko/1403 and or disinheriting any lawful heir to the estate of the deceased. The 1<sup>st</sup> defendant denies committing any fraudulent or unlawful act against the deceased's estate nor his heir and further states that it is the plaintiff who is a total stranger to the estate of the deceased. The defendant avers that he is the registered proprietor of land parcel registration number south Wanga/Lureko/1403 having lawfully acquired it vide Kakamega HCC Succ. Cause No. 461 of 2010. The 1<sup>st</sup> defendant states that the plaintiff and or her agents/servants have illegally and or unlawfully occupied/encroached and or trespassed on the said parcel of land without the defendants consent and have since commenced acts of wanton destruction on the 1<sup>st</sup> defendant's said property. The defendant avers that he has been in use and occupations of the land parcel registration number South Wanga/Lureko/1403 since he was a child and the plaintiff with her agents are out to defeat his rights and interests on the suit property by bringing up this case. The 1<sup>st</sup> defendants' counter claim against the plaintiff is for an order of permanent injunction restraining the plaintiff, her agents, servants and or any person acting on her behalf from interfering with the defendants' use and occupation of the land parcel registration number South Wanga/Lureko/1403.

This court has carefully considered the evidence therein. The 1<sup>st</sup> defendant did not give any defence. The 2<sup>nd</sup> defendant failed to attend court though served with the hearing date nor provide any oral evidence. The Land Registration Act is very clear on issues of ownership of land and Section 24(a) of the Land Registration Act provides as follows:

*“Subject to this Act, the registration of a person as the proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”*

Section 26 (1) of the Land Registration Act states as follows:

*“The Certificate of Title issued by the Registrar upon registration ... shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner... and the title of that proprietor shall not be subject to challenge except –*

- a. *On the ground of fraud or misrepresentation to which the person is proved to be a party; or*
- b. *Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”*

The law is clear that, the Certificate of Title issued by the Registrar upon registration shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner and the title of that proprietor shall not be subject to challenge except – On the ground of fraud or misrepresentation to which the person is proved to be a party; or Where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.

This court in considering this matter referred to the case of Elijah Makeri Nyangw'ra –vs- Stephen Mungai Njuguna & Another (2013) eKLR where the court held that the title in the hands of an innocent third party can be impugned if it is proved that the title was obtained illegally, unprocedurally or through a corrupt scheme. The court in the case while considering the application of section 26(1) (a) and (b) of the Land Registration Act rendered himself as follows:-

*“-----the law is extremely protective of title and provides only two instances for challenge of title. The first is where the title is obtained by fraud or misrepresentation to which the person must be proved to be a party. The second is where the certificate of title has been acquired through a corrupt scheme.”*

It is a finding of fact that the 2<sup>nd</sup> defendant is the absolute registered owner of the parcel of land known as No. S. Wanga/Lureko/1403 (PEX 3 is a copy of the green card). The 1<sup>st</sup> defendant avers that he is the registered proprietor of land parcel registration number south Wanga/Lureko/1403 having lawfully acquired it vide Kakamega HCC Succ. Cause No. 461 of 2010. The 1<sup>st</sup> defendant states that the plaintiff and or her agents/servants have illegally and or unlawfully occupied/encroached and or trespassed on the said parcel of land without the defendants consent and have since commenced acts of wanton destruction on the 1<sup>st</sup> defendant's said property. He has not produced any evidence to support his claim. I find the counterclaim has not been proved on a balance of probabilities and I dismiss the same. The plaintiff testified and submitted that the 1st defendant obtained the title fraudulently and later transferred it to the 2nd defendant. Particulars of fraud were, irregularly transferring title No. S. Wanga/Lureko/1403 from the deceased into his name without undertaking succession proceedings on 30.8.2013. Forging and or presenting forged documents to the officers at the lands office. Causing and or effecting transfer of title No. S. Wanga/Lureko/1403 without consent from the area Land Control Board. Transferring title No. S. Wanga/Lureko/1403 into his name secretly and without following due process. Disinheriting the plaintiff and other lawful heirs of the deceased. Acting dishonestly and in blatant breach of the order he had himself obtained vide Kakamega HCCC No. 171 of 2010. Obtaining registration of title No. S. Wanga/Lureko/1403 while fully aware he is not entitled to or in occupation or possession of any portion thereof and without reference to the lawful beneficiaries who are in occupation and use of the land. This evidence remains unchallenged. I find that the plaintiff has proved his case on a balance of probabilities and I grant the following orders;

1. A declaration and or order that the purported transfer and or registration of title No. S. Wanga/Lureko/1403 from the deceased Desteryo Kweyu Nyapore into the name of the defendant was fraudulent, irregular, illegal and unlawful and the same be cancelled and or revoked forthwith and it be ordered that the said title reverts to the name of the deceased Desteryo Kweyu Nyapore.
2. Costs of this suit to the plaintiff.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT KAKAMEGA IN OPEN COURT THIS 26<sup>TH</sup> JUNE 2019.**

**N.A. MATHEKA**

**JUDGE**